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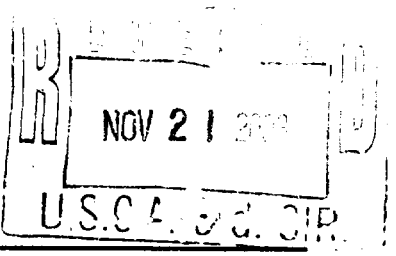

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In re ACQUISITION PARTNERS, L.P., FERNWOOD ASSOCIATES, L.P. AND DEUTSCHE BANK TRUST COMPANY AMERICAS,

Petitioners.

On Petition for a Writ of Mandamus to Judge Alfred M. Wolin, United States District Judge of New Jersey, sitting by designation in the United States District Court for the District of Delaware

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EMERGENCY PETITION FOR A WRIT OF MANDAMUS

KLEHR, HARRISON, HARVEY, BRANZBURG & ELLERS LLP
919 Market Street, Suite 1000
Wilmington, DE 19809-3062
(302) 426-1189

WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

EMERGENCY PETITION FOR A WRIT OF MANDAMUS

I. INTRODUCTION

Petitioners D.K. Acquisition Partners, L.P., Fernwood Associates, L.P. and Deutsche Bank Trust Company Americas respectfully request, pursuant to 28 U.S.C. § 1651, that this Court order a writ of mandamus to the Honorable Alfred M. Wolin, United States District Judge for the District of New Jersey (sitting by designation in the District of Delaware), directing Judge Wolin either to (a) recuse himself from further participation in *In re W.R. Grace*, et al., Case No. 01-01139 (JKF) (the "Grace Case"), or, alternatively, (b) expedite consideration of (and allow for discovery on) the recusal motion filed by Petitioners on Friday, November 14, 2003 (the "Grace Recusal Motion").

On October 24, 2003, Kensington International Limited and Springfield Associates, LLC (the "Owens Corning Petitioners") filed with this Court an Emergency Petition For A Writ Of Mandamus (the "Owens Corning Petition") in *In re Owens Corning, et al.,* Case No. 00-03837 (the "Owens Corning Case"). Similar to the relief sought herein, the Owens Corning Petitioners seek an order from this Court recusing Judge Wolin from participating in the Owens Corning Case, one of the Five Asbestos Cases,[1] or expediting Judge Wolin's hearing and consideration of

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[1] References to the Appendix made throughout this petition are noted a "A-__". The "Five Asbestos Cases" refers to the Grace Case, the Owens Corning Case, and three other asbestos-related chapter 11 cases pending in the District of Delaware -- In re Armstrong World Indus., Inc., et al., Case Nos. 00-4471, 00-4469,00-4470; In re Federal Mogul Global, Inc., T&N Ltd., et al., Case No. 01-10578; and In re USG Corp., et al., Case Nos. 01-2094 through 01-2104 -- that, on November 27, 2001, then-Chief Judge Becker of the Third Circuit Court of Appeals ordered transferred from the Bankruptcy Court and assigned to the Honorable Alfred M. Wolin of the United States District Court for the District of New Jersey, who temporarily was assigned to the District of Delaware. (A-p.10 (Designation of a District Judge for Service in Another District Within the Circuit (the "Designation Order"), Wills Aff. Ex. B).)

the recusal motion filed in the Owens Corning Case (the "Owens Recusal Motion"). The Owens Corning Petition, which this Court has agreed to consider, was brought on an emergency basis to ensure that the motion would be decided promptly and that substantive issues in the Owens Corning Case not be decided before that motion was resolved.

Similar concerns exist here. Indeed, although Petitioners filed the Grace Recusal Motion on November 14, 2003, and despite Petitioners' suggestion that the Court allow the Grace Recusal Motion to be considered simultaneously with the Owens Corning Petition,[2] which will be *sub judice* before this Court as of Friday, November 21, 2003, to date, there has been no response from the District Court with respect to that motion. Accordingly, because of the extremely important issues raised in the Grace Recusal Motion, the pendency of the Owens Corning Petition, and the need promptly to resolve the issues raised herein, Petitioners respectfully submit that they have been left with no other course of action than to seek emergency relief from this Court.

The issues at the heart of this Petition, and the Grace Recusal Motion, are of extreme significance to Petitioners and all other parties to this case and the other asbestos-related cases pending before Judge Wolin. Indeed, what has been brought into sharp focus in recent weeks is that Messrs. David R. Gross and C. Judson Hamlin (two of the "Consultants" appointed by Judge Wolin), who have participated materially in the District Court's administration of the Five Asbestos Cases, purportedly as neutrals, are anything but impartial advisers to the District Court.

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2 In the Recusal Motion (A-192 (Recusal Motion)), Petitioners noted that they were "prepared to file a Petition for a Writ of Mandamus to facilitate the Third Circuit's consideration of [the Recusal] Motion."

Instead, at the very same time that Messrs. Hamlin and Gross, and their respective law firms, have during the last two years been advising the District Court on critical issues and proceedings in these cases, mostly on an *ex parte* basis, they have been acting as partisan advocates for the interests of asbestos claimholders in another major and highly-contested (and related) asbestos bankruptcy case pending in this Circuit -- that of G-I Holdings Inc., f/k/a GAF Corporation, and its affiliates (collectively, "G-I").[3]

As with the Owens Corning Petitioners, Petitioners here believe that there is, at the very least, a substantial perception that the District Court has surrounded itself with, and has been taking *ex parte* advice from, Consultants who have an agenda distinctly at odds with their purported role as neutrals. and who have leveraged their consulting relationship with the Court in their advocacy roles in other cases. What is more, one of these District Court-appointed Consultants, Mr. Hamlin, has affirmatively sought to be appointed the representative of future asbestos claimants in the Grace Case in circumstances that only can call into question the fairness and transparency of those proceedings.

While Petitioners fully are aware of the significance of the issues raised in this Petition, and seek reluctantly to have Judge Wolin disqualified, the facts and circumstances brought into focus in recent weeks, and discussed more fully below, compel Petitioners to ask this Court to disqualify Judge Wolin from further participation in these jointly administered chapter 11 cases, or, alternatively, to order expedited briefing and an expedited hearing on the recusal motion brought by Petitioners.

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[3] See p. 19 for a discussion of how these cases are related.

II. STATEMENT

On April 2, 2001, W.R. Grace & Co., and 61 of its predecessors, subsidiaries, and other related entities (collectively, "Debtors"), filed for reorganization under Chapter 11 of the United States Bankruptcy Code. Each of the Petitioners is a creditor in the W.R. Grace chapter 11 cases, holding claims against Debtors arising under: (i) a certain $250 million credit facility, entered into as of May 14, 1998; and/or (ii) a certain $250 million revolving credit facility dated as of May 5, 1999 (collectively, the "Credit Facilities").

As holders of claims against Debtors arising under the Credit Facilities, Petitioners, along with Bear Stearns, resolved to form the Unofficial Committee to represent the interests of its members in this case.[4] As of August 2003, the fixed, liquidated aggregate claim of the members of the Unofficial Committee against Debtors, exclusive of accrued and accruing post-petition date interest, was estimated to be not less than $150 million. This estimate includes outstanding principal as well as estimated pre-petition interest and facility fees.

On January 5, 2001, just a few months before Grace filed, G-I filed for chapter 11, and its case currently is pending before the Honorable Rosemary Gambardella in the United States Bankruptcy Court for the District of New Jersey (the "G-I Court"). On October 11, 2001, the G-I Court appointed Mr. Hamlin to serve as the "Legal Representative of Present and Future Holders of Asbestos-Related Demands." (A-6 (Order Appointing Legal Representative of Present and Future Holders of Asbestos-Related Demands in G-I's Chapter 11 Case, Wills Aff. Ex. A).) Mr. Hamlin, in turn, hired Mr. Gross (and the firm with which he was then a partner) to represent the interests of the asbestos claimants in that case.

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[4] Bear Stearns has not joined in the Recusal Motion, and this Petition is not being brought on its behalf.

On November 27, 2001, then-Chief Judge Becker ordered that Debtors' cases and four other asbestos-related chapter 11 cases pending in the District of Delaware be transferred from the Bankruptcy Court and assigned to the Honorable Alfred M. Wolin of the United States District Court for the District of New Jersey, who temporarily was assigned to the District of Delaware. (A-10 (Designation of a District Judge for Service in Another District Within the Circuit (the "Designation Order"), Wills Aff. Ex. B).) Judge Becker directed that "these bankruptcy cases, which carry with them tens of thousands of asbestos claims, need to be consolidated before a single judge so that a coordinated plan for management can be developed and implemented." (A-10 (id. ¶ 2).)

On December 28, 2001, at a time when Hamlin and Gross were already acting as partisan advocates for asbestos claimants in the G-I case (many of whom are also likely within the classes of asbestos claimants in one or more of the Five Asbestos Cases), the District Court appointed Messrs. Hamlin and Gross, and three other individuals, as Court Appointed Consultants (the "Consultants") in the Five Asbestos Cases. (A-13 (Order Designating Court Appointed Consultants and Special Masters (the "Appointment Order"), Wills Aff. Ex. C).)[5]

On or about October 10, 2003, Kensington International Limited and Springfield Associates, LLC, creditors of Owens Corning, filed a motion to recuse the Honorable Alfred M. Wolin from further participation in the Owens Corning bankruptcy proceedings. (A-192) That Recusal Motion highlighted the dual and conflicting capacities in which Messrs. Hamlin and Gross have been acting, in their roles as Consultants to the District Court in these cases, and as representatives of pending and future asbestos claimants in the G-I bankruptcy proceedings.

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5 The three other Consultants are William A. Dreier, Esq., John E. Keefe, Esq., and Professor Francis E. McGovern. (Id.)

Kensington and Springfield sought discovery of Hamlin and Gross, as well as of their law firms, and of W.R. Grace in connection with the Recusal Motion.

On October 13, 2003, the Debtors in this case filed an Application pursuant to 11 U.S.C. §§ 105, 327 and 524(g)(4)(B), for the appointment of C. Judson Hamlin as legal representative for future claimants in the W.R. Grace proceedings (the "Hamlin Application"). (A-225)

On October 23, 2003, the District Court sua sponte suspended all briefing and discovery in connection with the Recusal Motion. The next day, Kensington and Springfield filed an emergency petition for a writ of mandamus directing Judge Wolin either to recuse himself from further participation in the Owens Corning proceedings or to expedite consideration of (including discovery on) the Recusal Motion (the "Petition for Mandamus" or "Petition").

On October 28, 2003, the District Court entered an order entitled "Case Management Order and Order to Show Cause" concerning the Recusal Motion, which, among other things, ordered the Consultants to submit affidavits to the District Court setting forth certain information relating to their activities as Consultants and in the G-I case (the "October 28 Order"). On October 29, 2003, the Unofficial Committee filed its Objection to the Hamlin Application.

Then, on October 30, 2003, the Court of Appeals for this Court issued an order which (a) stayed all proceedings "affected by [the Petition for Mandamus], and in particular all substantive proceedings before the relevant Bankruptcy Court and the District Court pertaining to [the Owens Corning proceedings]"; (b) exempted from the stay any actions to be taken or information to be furnished to the District Court concerning the Recusal Motion as required by the District Court's October 28 Order; (c) ordered respondents affected by the Petition for Mandamus to file Answers with the Third Circuit no later than noon on November 6, 2003; and (d) invited the District Court to address and respond to the Petition. (A-236 (Order, dated October 30, 2003).)

The next day, October 31, 2003, Owens Corning filed a motion for clarification of this Court's order. The motion requested that the Court limit its stay to the proceedings before the District Court so that the proceedings before the Bankruptcy Court could proceed.

On November 3, 2003, Judge Wolin filed a Response to the Petition for Mandamus, stating that the District Court "will judge the Motion to Recuse on the law and facts presented after all of the parties have been heard in full" and that it recognizes "the need to resolve the motion as quickly as possible, regardless of jurisdictional issues, to minimize the inevitable harm that will impact the progress of the several asbestos-related bankruptcies under its supervision."

Contemporaneously with the filing of Judge Wolin's Response on November 3, 2003, this Court issued an order clarifying that only the proceedings pending before Judge Wolin were stayed, and that proceedings before the Honorable Judith A. Fitzgerald, not involving Judge Wolin, could proceed. The Court also modified the briefing schedule to extend the date for responses to the Petition to November 21, 2003.

On November 14, 2003, each of the five Consultants filed affidavits in response to the recusal motion and in support of Judge Wolin's actions and their roles in the Five Asbestos cases. As discussed below, the affidavits do not address the appearance of bias created by the dual roles of Messrs. Hamlin and Gross as advocates in the G-I case and neutral consultants to the District Court in the Five Asbestos Cases.

Three days later, on November 17, 2003, Judge Fitzgerald refused to allow the adjournment of the Hamlin Application sought by Grace, and instead required the Debtors either to withdraw the application or to prosecute it in which case she would deny it. Faced with that choice, the Debtors withdrew the application.

III. RELIEF SOUGHT

Petitioners request that this Court disqualify Judge Wolin from further participation in any proceedings in connection with Debtors' chapter 11 case, or, alternatively, order expedited briefing and an expedited hearing on the recusal motion brought by Petitioners. The relief requested in this Petition is based upon the arguments and authorities set forth herein, the Record, and upon such other evidence and argument as may be presented to the Court.

IV. REASONS WHY A WRIT SHOULD ISSUE.

As this Court has noted, "public confidence in the judicial system mandates, at a minimum, the appearance of neutrality and impartiality in the administration of justice." Alexander v. Primerica Holdings, Inc., 10 F.3d 155, 157 (3d Cir. 1993). Indeed, "impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system." Id. at 167. These qualities are important in all judicial proceedings, and none more so than bankruptcy proceedings. See In re Ira Haupt & Co., 361 F.2d 164, 168 (2d Cir. 1966) ("The conduct of bankruptcy proceedings not only should be right but must seem right.").

Congress recognized the need "to promote public confidence in the integrity of the judicial process." Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858 (1988); see also In re School Asbestos Litig., 977 F.2d 764, 777 (3d Cir. 1992) (noting "Congress's great concern for the public's confidence in the judiciary"). That concern resulted in the enactment of 28 U.S.C. section 455(a), which provides that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added); see also Judicial Conduct Code Canon 3C ("Disqualification (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . .").

As observed by this Court, "Congress enacted subsection 455(a) precisely because 'people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. In high profile cases . . . the outcome of which will in some way affect millions of people, such suspicions are especially likely and untoward.'" In re School Asbestos Litig., 977 F.2d at 782 (citations omitted).

Because of the extremely important concerns underlying the enactment of section 455, the standards applied to its enforcement are exacting, and leave little room for doubt. "Whenever a judge's impartiality 'might reasonably be questioned' in a proceeding, 28 U.S.C. § 455(a) commands the judge to disqualify himself sua sponte in that proceeding." Alexander, 10 F.3d at 162 (emphasis added) (citations omitted). "[W]hether the district court judge actually harbors any bias against a party" is irrelevant -- what matters is that the court maintain its appearance of impartiality. Id.

Further, it is not relevant whether the judge "actually harbors any illegitimate pro-plaintiff bias." In re School Asbestos Litig., 977 F.2d at 782. Nor does it even matter "whether or not the judge actually knew of the facts creating an appearance of impropriety. . . ." Liljeberg, 486 U.S. at 860. Rather, all that matters is whether, "regardless of [the judge's] actual impartiality, a reasonable person might perceive bias to exist, and this cannot be permitted." Id.; see also United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982) (the focus of the disqualification inquiry "is on the objective appearance of bias, rather than bias-in-fact").

A. Section 455(a) Mandates Disqualification Under The Circumstances Present Here.

1. Messrs. Hamlin's and Gross's Roles as Close Advisors To the District Court for the Past Twenty-Two Months.

As noted above, the District Court appointed Hamlin and Gross as Consultants in the Five Asbestos Cases, which include the Grace Case, on December 28, 2001. The grant of authority provided each of the Consultants was extremely broad. As the District Court stated, the purpose of the "Consultants is to advise the Court and to undertake [certain] responsibilities, including by way of example and not limitation, mediation of disputes, holding case management conferences, and consultation with counsel . . . ." (A-13(Appointment Order, ¶ 3, Wills Aff. Ex. C).)

Pursuant to the Appointment Order, Hamlin and Gross, as well as the other Consultants, were also delegated "certain authority to hear matters and to advise the District Court on issues that may arise in these five large Chapter 11 cases." (A-13 (Id. ¶ 1).) For example, the Appointment Order provided that the District Court could, "without further notice, appoint any of the Court Appointed Consultants to act as a Special Master to hear any disputed matter and to make a report and recommendation to the Court on the disposition of such matter." (A-13 (Id. ¶ 4).)

The significance of the Consultants' role in this and the other Five Asbestos Cases cannot be overstated. Indeed, the District Court itself has described the Consultants, including Hamlin and Gross, as "necessary for the efficient administration of these very large mass-tort chapter 11 cases," and as "occupying a unique position in the [asbestos] cases not shared by other persons employed in these cases." (A-17 (Fee Allowance Order, ¶ 1, Wills Aff. Ex. D).) Furthermore,

the District Court has described the Consultants as "functioning in a manner in all respects similar to examiners as provided for in the Bankruptcy Code." (A-17 (Id.).)[6]

In his role as a Consultant, Mr. Hamlin has, consistent with the grant of authority he received, participated materially in these cases as an advisor to the District Court. Mr. Hamlin's time records show that, over the course of the past twenty-two months, he has been involved in, among other things, several meetings with the District Court and the other Consultants, and the drafting of a memorandum relating to the propriety of certain motions filed by parties to these bankruptcy cases. (A-60-82, 94-97, 149-150, 151-158 (Wills Aff. Exs. G,J,N, and O).)

Mr. Gross has been even more involved in this matter than Mr. Hamlin, and in more frequent contact with the District Court. Indeed, Mr. Gross and his law firms have devoted hundreds of hours to these cases, and, through the spring of 2003, have billed the debtors in the Five Asbestos Cases nearly $600,000. (See A-83-93,151-158, 166-172) (Wills Aff. Exs. H, I, O, and Q Mr. Gross's time records show that he and his associates have participated in numerous meetings, many of which were *ex parte*, with the District Court, its staff, and the other Consultants. (Id.)

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[6] It is important to note that examiners must be disinterested. See In re Big Rivers Electric Corporation, 284 B.R. 580, 595 (W.D.Ky. 2002) ("It is clear that the Examiner must be a "disinterested person" within the meaning of the Bankruptcy Code and Bankruptcy Rules."). As is relevant here, the Bankruptcy Code defines a disinterested person as a person that: (i) "is not a creditor, an equity security holder, or an insider" and (ii) "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker ... or for any other reason." 11 U.S.C. 101(14)(A),(E). For the reasons set forth below, the Consultants are not disinterested.

In short, it cannot reasonably be disputed that Messrs. Hamlin and Gross have had unparalleled access to the District Court. In addition, they have had, and continue to have, influence with the District Court and the District Court's decision-making process that is not shared by Petitioners. Clearly, then, because of this access and influence, Messrs. Hamlin and Gross were duty bound to remain neutral, and to avoid anything that would raise the specter of partiality or bias.

2. Mr. Hamlin's and Mr. Gross's Roles as Partisan Advocates for Asbestos Claimants in the G-I Bankruptcy Case.

Despite their duty of neutrality, during the time that they have been acting as close advisors to the District Court in the Five Asbestos Cases (and have had significant *ex parte* contact with the District Court), Hamlin and Gross have also been actively involved as partisan advocates for asbestos claimants in the G-I bankruptcy case. Specifically, as noted above, on October 11, 2001, the G-I Court appointed Mr. Hamlin to serve as the "Legal Representative of Present and Future Holders of Asbestos-Related Demands." (A-6 (Wills Aff. Ex. A).) Mr. Hamlin hired Mr. Gross and the firm with which he then was a partner to represent the interests of the asbestos claimants in that case. (A-23 (Wills Aff. Ex. E).) In those roles, both Mr. Hamlin and Mr. Gross are duty bound to see that the asbestos claimants whom they represent in that related case receive the greatest consideration possible, even if such consideration comes at the expense of other creditor classes or subjects the debtors to onerous obligations.

The close relationship between Debtors' case and the G-I case is not mere speculation. For example, both Debtors and G-I were leading manufacturers of asbestos-containing building products and were the subject of thousands of asbestos-related claims that eventually forced them into bankruptcy. Because asbestos claimants frequently claim to have been exposed to asbestos-containing products produced by more than one manufacturer, or are unsure of the

identity of the manufacturer who produced the product that allegedly caused their injuries, it is not uncommon for asbestos claimants to assert claims against different manufacturers of similar products. Thus, it is highly probable that a significant number of the asbestos claimants in the G-I bankruptcy case also are or will be claimants in the Grace Case as well.

Further, as representatives of a class of creditors that, by definition, has no currently identified limit to its members, Messrs. Hamlin and Gross stand to be important power brokers in the G-I case. They undoubtedly have been involved or will be involved in the consideration of significant legal and factual issues bearing on the interests of future asbestos claimants and other constituent parties in the G-I case, issues which overlap with issues that have surfaced or will surface in these cases. Indeed, it is likely that a viable plan of reorganization will not be confirmed in the G-I case without the active participation and approval by Messrs. Hamlin and Gross.

3. Messrs. Hamlin's and Gross's Dual Roles for the Past Twenty-Two Months in These Cases and in the G-I Case Have Created Potential And Actual Conflicts of Interest and, at Least, the Appearance of Impropriety or Bias.

By virtue of the unique -- indeed, unprecedented -- positions they hold in this and the other asbestos cases in which they are Consultants, Mr. Hamlin and Mr. Gross have the ability to play a material role in the manner in which these cases are administered. More importantly, they have the power to shape or influence precedent and decision-making. By performing legal research concerning, and advising the Court on, issues that come before Judge Wolin, as well as attending hearings in their roles as Consultants, Messrs. Hamlin and Gross unquestionably have -- or, just as importantly, appear to have -- significant influence on the District Court.

The District Court established high standards for the Consultants with its Order of Appointment. Regrettably, the unfolding record demonstrates that at the same time that they have been advising the District Court, Hamlin and Gross have been acting as advocates on behalf of asbestos claimants in the G-I case, and, apparently, they have relied on their relationship with Judge Wolin in the Five Asbestos Cases to their clients' advantage in the G-I Case. In addition, as advocates, they have been meeting with other futures representatives and counsel in order to develop a coordinated strategy in a large number of asbestos-related bankruptcy cases. ((A-60-82, 94-97, 149-150, 151-158 (Wills Aff. Exs. G,J,N, and O))

These dual roles have given Messrs. Hamlin and Gross the ability to influence the decision-making process in the Five Asbestos Cases in a way that could positively affect the fortunes of their constituents in the G-I bankruptcy case. Indeed, it would appear to any objective observer that Messrs. Hamlin and Gross are in a position to influence the District Court, on an *ex parte* basis, on issues that directly affect their constituents' rights in the G-I case, or in any other asbestos-related case in which they might become involved. This dual role creates the appearance that the District Court's adjudications in these five asbestos cases have been and will be influenced by the leanings of the supposedly neutral advisors, who are anything but neutral and impartial,.

It matters not whether the District Court's impartiality has actually been compromised in this case. What matters is that as a result of Mr. Hamlin's and Mr. Gross's dual and conflicting roles, a reasonable person might perceive partiality or bias to exist. This cannot be reasonably disputed, nor can it be permitted. See Liljeberg, 486 U.S. at 860. Thus, because the District Court's "impartiality 'might reasonably be questioned'" in this proceeding, "28 U.S.C. § 455(a)

commands" that Judge Wolin be disqualified. See Alexander, 10 F.3d at 162 (emphasis added) (citations omitted).

The mere fact of Hamlin's and Gross's incompatible positions in their dual roles itself creates an "appearance" of impropriety. Messrs. Hamlin and Gross, however, have not attempted to downplay their special status with Judge Wolin in their advocacy before Judge Gambardella. Rather, they repeatedly and explicitly have highlighted their relationship with Judge Wolin in their advocacy before Judge Gambardella in the G-I case. While some examples of this impropriety have been disclosed by and discussed more fully in the Owens Corning Recusal Motion,[7] there are other examples of Messrs. Hamlin and Gross's using (or being perceived to use) their closeness to Judge Wolin to advance their litigation strategy in the G-I case.

On December 13, 2002, in a motion to appoint a Chapter 11 trustee, Mr. Gross, appearing on behalf of Mr. Hamlin, directly acknowledged his dual role when he prefaced his argument by stating:

> As your Honor knows, I represent the legal representative in this situation; and although I have not been before your court on many occasions with respect to the bankruptcy world, I've had substantial experience in that

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[7] For example, the Owens Corning Recusal Motion notes that Hamlin and Gross invoked the District Court's precedent in opposing G-I's application for an order establishing a method to liquidate claims and to fix a final bar date; they argued that the District Court's decisions in this case did not stand for the proposition that future asbestos claims were "claims" that could be discharged in bankruptcy; and they argued that this issue was not before the District Court in these cases. (A-192 (Recusal Motion, at 30 (quoting G-I Claims Liquidation Sur-Reply at 7), Wills Aff. Ex. S).) Further, suggesting an insight into the District Court's thinking that they could have obtained only through their roles as close advisors to the District Court, Hamlin and Gross added that, "if this issue had been before him, it is certain that Judge Wolin would not have held that future claimants hold dischargeable bankruptcy claims under the Bankruptcy Code based upon the significant authorities . . . ." (A-192 (Id.).) (emphasis added).

world as a result of my appointment in another court in this building with respect to some of the bankruptcies before Judge Wolin.

(A-98 (Excerpted Transcript of December 13, 2002 hearing at 57-58, Wills Aff., Ex. K) (emphasis added).) Gross continued to emphasize his role in the case before Judge Wolin throughout this hearing. At one point he offered to "share with this court as to what has gone on in other bankruptcy proceedings which involved large corporations similarly situated as to the debtor here." (A-98 (Id. at 60).) He further represented that he could "go into some greater detail--with what has happen[ed] in other bankruptcies" and suggested that the court "look at the other bankruptcies and the way they have been handled." (A-98 (id. at 62).) Gross again referred to his experience in Judge Wolin's court in his criticism of the debtor, noting that "[t]hese circumstances do not seem to be present in the other cases that I've had some history with, if you will." (A-98 (id. at 66).) Mere moments later, Gross was compelled to "stress again the timing of these other bankruptcies" and to recommend to the court that "once again you have to look to some extent to the past, if you will, and what's going on presently in these other bankruptcies." (A-98 (id. at 67).)

Mr. Gross did not restrict himself merely to reminding the court that he was familiar with the proceedings in Judge Wolin's court. He went one step further by intimating that he had special insight into Judge Wolin's thought processes: "I think that the reliance perhaps that counsel for the debtor has placed on the opinion by Judge Wolin in the Sealed Air case is perhaps overstated, and there is no point in going further than that. . . ." (A-98 (id. at 69).) Having earlier reminded the court of his unique role in the Five Asbestos Cases before Judge Wolin (A-98 (see id. at 57-58)), there really was no reason to go further -- the reasonable inference to be drawn from that colloquy was that Mr. Gross, perhaps better than any one else in the courtroom, knew what Judge Wolin intended in the Sealed Air case.

More recently, Messrs. Hamlin and Gross have again emphasized their connection to Judge Wolin. On September 30, 2003, both Hamlin and Gross appeared before the G-I Court in a hearing regarding a proposed abbreviated proof of claim form in connection with an estimation procedure for asbestos claimants. The transcript from that hearing reveals that, as noted by counsel, earlier in the day "Judge Wolin . . . had a session on the estimation process in the U.S.G. case. . ." (A-173 (Excepted Transcript of September 30, 2003 hearing, at 13, Wills Aff. R).) Trevor Swett, counsel for the Asbestos Creditors Committee, noted that at that session Judge Wolin adopted the type of abbreviated proof of claim form being advocated by the Asbestos Creditors Committee in the G-I case, as opposed to a more lengthy claim form advocated by the debtor. (A-173 (id.).)

The session with Judge Wolin referred to in the G-I transcript appears to have been off the record, as it does not appear on the USG docket. However, the G-I transcript makes clear that Mr. Gross, and possibly Mr. Hamlin, as well, attended the proceeding with Judge Wolin in some capacity. (A-173 (id.).) During the G-I hearing, held on the same day as the Judge Wolin session, Mr. Hamlin's attorney, Kevin Irwin, encouraged the G-I court to adopt Judge Wolin's ruling, stating "[w]e note Judge Wolin's proceedings with interest," and reminding the court that "[w]e've cited to you in the past when Judge Wolin announced this route. . . ." (A-173 (id. at 19).) Mr. Irwin went on to paraphrase Judge Wolin's reasoning and noted that the Futures Representative, Mr. Hamlin, would welcome a similar ruling in the G-I case. (A-173 (id.).)

What these examples demonstrate is that Mr. Gross and Mr. Hamlin, in their roles as lawyers or legal representatives, have repeatedly suggested that their views on issues in the G-I case should carry more weight, or resonate more effectively, by virtue of their involvement with the Judge who presides over five of the largest asbestos-bankruptcy cases and whose decisions

have affected and will the parties interested in those cases. The roles of Hamlin and Gross as partisan advocates for the interests of asbestos claimants in the G-I case create a direct conflict of interest with their roles as purportedly impartial and neutral advisors to the District Court in this case. Clearly, the possibility exists that whatever advice and consultation they have provided to the District Court has been colored, wittingly or not, by their participation in the G-I case as advocates for asbestos claimants. Again, it is immaterial whether that actually is the case; the mere appearance of such a conflict is grounds for disqualification.

4. Messrs. Hamlin and Gross's Repeated *Ex Parte* Contacts with the District Court Further Foster an Appearance of Partiality and Impropriety.

The similarities between this case and the situation presented in Edgar v. K.L., 93 F.3d 256 (7th Cir. 1996) are undeniable. The trial judge in K.L. appointed a panel of experts to advise him. Two of the appointed experts later took on partisan roles outside of the case. The Seventh Circuit criticized the partisan advocacy of the experts, noting that "[e]xperts appointed and supervised by a court carry special weight because of their presumed neutrality." Id. at 262.

In its determination that disqualification was mandatory under those circumstances, the Seventh Circuit was equally critical of the fact that the trial judge had held *ex parte* meetings with the panel. The court held that knowledge acquired in the judge's chambers and not "enter[ed into] the record . . . or tested by the tools of the adversary process" was personal knowledge, not gained in a judicial capacity. Id. at 259. In disqualifying the trial judge, the Seventh Circuit confirmed that the *ex parte* meetings were no less egregious than if the judge had himself undertaken a personal investigation of the facts involved. Id. at 259-60.

Here, most, if not all, of the Consultants' work for the District Court in these cases has occurred *ex parte* and, therefore, beyond the scrutiny of the parties, a fact which only compounds

the problem. In fact, a review of Gross's and Hamlin's fee applications discloses that, during the very same period that they were acting as partisan advocates for asbestos claimants in the G-I bankruptcy case, they have each met with the District Court on an *ex parte* basis more than 40 times. (See (A-60-82, 94-97, 149-150, 151-158 (Wills Aff. Exs. G,J,N, and O).) More troubling, however, is what is disclosed by a side-by-side comparison of (i) Hamlin's and Gross's bills in the Five Asbestos Cases, (ii) Hamlin's and Gross's bills in the G-I case, and (iii) Futures Representative James J. McGonagle's bills in the Owens Corning case. For example, there are numerous instances in which Hamlin and Gross, as partisan advocates for asbestos claimants in G-I, met *ex parte* with Mr. McGonagle and others to discuss "common futures issues." (A-29 (Wills Aff. Ex. F (showing that such meetings were billed to G-I)).) That is, at the same time that they had the "ear" of the District Court in the Five Asbestos cases as Court-appointed neutrals, Messrs. Hamlin and Gross were meeting with the Futures Representative in one of those Five Asbestos Cases discussing "common issues" between future asbestos cases in G-I and Owens Corning. (Interestingly, though Mr. McGonagle disclosed the details of this meeting in his time sheets, in his time sheets for the same meeting, Mr. Hamlin did not include the names of the participants, including Mr. McGonagle. (See A-29, 60 (Wills Aff. Exs.F andG).)

A review of Mr. Hamlin's bills in the G-I case reveals further troubling information about his frequent contact with Future Representatives during his tenure as a supposedly neutral advisor to Judge Wolin. He has recorded at least ten communications with other Future Representatives since his appointment in the G-I case. There are indications that some of these meetings may have included representatives from the Five Asbestos Cases. For example, on August 2, 2002, Hamlin met with Future Representatives of "5 other Chapter XI asbestosis bankruptcies re: common issues and alternatives." (A-94 (Wills Aff. Ex. J).)

Indeed, as stated above, it is clear that Mr. McMonagle was present for at least some of the meetings. Mr. Hamlin, thus, has been in a position to advise Judge Wolin in the USG case and then turn around and bill G-I for a "[r]eview of Judge Wolin's decision in USG as it may effect estimation issues pending in G-I." (A-94.) The conflicts are inherent. These time entries indicate that, in his role as a partisan advocate on behalf of asbestos claimants in the G-I Case, Mr. Hamlin may be working with other such advocates to formulate common strategies to advance their and their clients' collective interests in all of the asbestos-related bankruptcy cases. It simply is not credible to think that, when he is advising the District Court in this or any of the other Five Asbestos Cases, Mr. Hamlin can shed his partisan instincts and provide the District Court with wholly neutral and unbiased advice on issues that may affect his clients in G-I, or the clients of his colleagues in other asbestos-related cases.

The same comparison of Mr. Gross's bills also reveals troubling details that raise concerns about whether Mr. Gross is using, or is able to use, his relationship with Judge Wolin to his advantage in his advocacy outside of the courtroom as well. For example, on March 21, 2003, Mr. Gross participated in an *ex parte* conference call with the District Court to discuss the "Overall Asbestos Program." (A-151 (Wills Aff. Ex. O).) Just a few days after that call with the District Court, on March 25, 2003, Mr. Gross met with Mr. Hamlin and "all other Futures Reps" in New York City to discuss matters relating to the handling of claims by future asbestos claimants. (A-133 (Wills Aff. Ex. N).) Then just two days later, Mr. Gross again had a conference call with the District Court. (A-151 (Wills Aff. Ex. O).)

The timing of Mr. Gross's *ex parte* communications with the District Court (which he billed as a Consultant) and his meetings with partisan advocates for asbestos claimants (which he billed to G-I) would lead any casual observer to have grave concerns that Mr. Gross has been

intermingling his role as a Court-appointed consultant, and the *ex parte* access to the District Court it allows, with his role as a partisan advocate to asbestos claimants -- the group of individuals who, by far, seek the largest distribution of assets in these bankruptcies. Horrible imaginings? Perhaps, but when pieced together, that these time logs create the appearance of an unfair and potentially biased judicial process.

The affidavits recently filed by each of the Consultants do nothing to quell the concerns raised by their advocacy roles and their *ex parte* contact with the District Court.[8] Unlike the other Consultants, Messrs. Hamlin and Gross have not even tried to allege that their *ex parte* contact is limited to procedural and scheduling matters. Mr. Hamlin concedes that he drafted an opinion for Judge Wolin regarding an appeal by the U.S. Trustee in the Owens-Corning case. See Hamlin Aff at ¶13. That Judge Wolin may not have used Mr. Hamlin's draft is irrelevant. Id. The fact is that Judge Wolin read it and that it reflected the opinions of a Consultant who should be but is not neutral. Similarly, Mr. Hamlin's statement that he has never discussed substantive or procedural issues in the G-I case with Judge Wolin adds no comfort. This statement does not address the fact that Mr. Hamlin was in a position where he could have discussed issues with Judge Wolin that arose in the Grace case and were relevant to the G-I case, as well.

Similarly, Mr. Gross's declaration that his role in the G-I case has been public knowledge during the entire time that he has been a "settlement facilitator" for Judge Wolin, is equally irrelevant. See Gross Aff. at ¶8-9. Even assuming that parties in the Grace case who are not in

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[8] The affidavits of John E. Keefe ("Keefe Aff."), William A Dreir ("Dreir Aff."), Francis E. McGovern ("McGovern Aff."), C. Judson Hamlin ("Hamlin Aff.") and David R. Gross ("Gross Aff.") are Exhibits V-Z to the Wills Aff. (A-239-334).

the G-I case should have been aware of Mr. Gross's advocacy role in the G-I case, that fact does not obviate the concerns raised by an advocate on behalf of asbestos claimants having *ex parte* meetings with Judge Wolin.

Gross states that every entry on his billing records (presumably including his *ex parte* meetings with Judge Wolin) reflect his performance as a settlement facilitator. Id. at ¶15. This admission proves that a partisan has been trying to mediate settlement discussions and that the same partisan is meeting with the District Judge regarding such settlement. It is difficult to review these facts without concluding that Mr. Gross is in a position to influence settlement discussions in one case that may influence what happens in another case.

It may be suggested that Petitioners should not be heard to complain about there having been *ex parte* communications between the District Court and the Consultants and other parties to this case as that has been the procedure followed by the District Court from the outset. It may well be the case that some parties have been on notice, or at least may have heard or understood, based on their level of participation in the five asbestos cases, that there would be *ex parte* communications. But that does not obviate the serious concerns that such communications by their very nature raise. As one court observed, "it is rarely possible to prove to the satisfaction of the party excluded from the communication that nothing prejudicial occurred. The protestation of the participants that the communications were entirely innocent may be true, but they have no way of showing it except by their own self-serving declaration. This is why the prohibition is not against 'prejudicial' *ex parte* communications, but against *ex parte* communications." Burgess v. Stern, 311 S.C. 326, 330-331 (Sup. Ct. 1993).[9]

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[9] It is equally true that the Consultants submit fee applications with time records to the District Court. However, that does not provide a sufficient remedy to the concerns that

In its Supplemental Response, the District Court notes it established a case management system in the Five Asbestos Cases that relied on routine *ex parte* communications between the Court and counsel and parties to the cases, and explains how, in the District Court's view, that mode of case management was necessary or effective. As framed by the Petitioners' motion, and by this Petition, the issue is not whether having a case management system in which the parties are encouraged -- or required -- to engage in *ex parte* communications with the Court is or is not an effective case management tool. The issue is that such a system increases the likelihood that the judicial administration of these cases is neither transparent nor conducive to the fostering of an appearance of impartiality and fairness. The problem is compounded when the *ex parte* communications with the District Court include Consultants, some of whom occupy roles as advocates in another large asbestos-related bankruptcy case.

Finally, the District Court's Supplemental Response can be read as suggesting that these Petitioners have availed themselves of *ex parte* communications and that, as a result, any objection they may have to *ex parte* communications is waived or Petitioners' motives should be questioned. Even if Petitioners had had *ex parte* communications, the fact that parties find themselves having to play by the rules established by the court does not mean that that system is appropriate. Moreover, the Asbestos Case Management Conference statement attached to the District Court's Supplemental Response reflects that the District Court sua sponte deemed any

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ex parte communications raise. The time records are themselves not very descriptive of the activities undertaken by the Consultants, and, in some cases, such as with Mr. Gross's time records, the names of persons with whom he has consulted or discussed matters relating to his role as an advisor to the District Court are redacted even when such meetings included Judge Wolin. And, the actual contents of their *ex parte* communications with the District Court are not revealed.

objection to have been waived prospectively. (See A-333 ("In order to effectively case manage complex litigation, it is necessary for the judge to speak and/or meet with attorneys on an *ex parte* basis, without permission of adversary attorneys. Any objection to such *ex parte* communication is deemed waived.") In any case, these Petitioners have not availed themselves of what the District Court describes as "free access to the Court" in the W.R. Grace case. Counsel will seek to ascertain whether such contacts occurred in any other case, but is currently unaware that any Petitioner has such contact.

Because of the conflicting roles occupied by Messrs. Hamlin and Gross in these related bankruptcy matters and their *ex parte* access to the Court, section 455(a) mandates the disqualification of the District Court from any further involvement with Debtors' cases.

5. Mr. Hamlin's Application to Be Appointed as the Futures Representative in the W.R. Grace Bankruptcy Proceedings Underscores the Conflict of Interests and Appearance of Partiality or Bias Present in the Cases Before Judge Wolin.

A more recent development highlights the troubling perceptions created by the participation of Messrs. Hamlin and Gross in these cases. especially at a time when "people . . . are often all too willing to indulge suspicions and doubts concerning the integrity of judges." In re School Asbestos Litig., 977 F.2d at 782 (citations omitted).

At the very same time that Mr. Hamlin continued to serve as a Consultant in the Five Asbestos Cases, and a partisan advocate for asbestos claimholders in G-I, he sought to become appointed as Futures Representative for asbestos claimants in the W.R. Grace bankruptcy proceedings. (A-225 (Wills Aff. Ex. T, Application Of Debtors Pursuant To 11 U.S.C. §§ 105, 327 And 524(g)(4)(B), For The Appointment Of C. Judson Hamlin As Legal Representative For Future Claimants (the "Application")).) Whatever pretense of neutrality that Mr. Hamlin may have retained despite his role as representative of asbestos claimants in the G-I case certainly

was destroyed by the recently filed (and now, not surprisingly withdrawn) Application, seeking to have Mr. Hamlin fill the same role here as he has filled in the G-I case, as a partisan advocate for asbestos claimants. (A-225 (id.).)

Irrespective of whether the District Court was involved in or aware of Debtors' selection of Mr. Hamlin, the mere fact that Mr. Hamlin (and perhaps others) chose to ignore the patent conflicts of interest presented by his dual and conflicting roles raises serious questions about the fairness and transparency of the proceedings in the W.R. Grace case. It is indeed unfortunate that these facts raise an appearance of impropriety, but it is the fact that they do, and this is just the sort of situation that section 455(a) was enacted to remedy.

In sum, it is not reasonable to believe that every time Messrs. Hamlin and Gross have counseled and advised the District Court on matters relating to the administration of the W.R Grace case, they have set aside their partisan leanings as advocates for their constituents in the G-I case. It is, on the other hand, reasonable to believe that Messrs. Hamlin and Gross are no more capable of compartmentalizing their conflicts than anyone else would be in similar circumstances. In fact, it appears that they may not have even attempted to compartmentalize their conflicts. Any outside observer who is not privy to the *ex parte* discussions between the Consultants and the District Court, would reasonably question the impartiality of the District Court and perceive the real potential for partiality or bias to exist. As such, regardless of whether the District Court's impartiality actually has been affected in this case, section 455(a) mandates that Judge Wolin disqualify himself. Public confidence in the judicial system, and the appearance of neutrality and impartiality in the administration of these large chapter 11 cases, permits nothing less.

CONCLUSION

For all the foregoing reasons, Petitioners ask this Court to disqualify Judge Wolin from further participation in these jointly administered chapter 11 cases, or, alternatively, to order expedited briefing and an expedited hearing on the recusal motion brought by Petitioners.

Dated: November 21, 2003

KLEHR, HARRISON, HARVEY, BRANZBURG & ELLERS LLP

By: Joanne B Wills
Joanne B. Wills (DE Bar No. 2357)
Jennifer L. Scoliard (DE Bar. No. 4147)
919 Market Street, Suite 1000
Wilmington, DE 19809-3062
(302) 426-1189

WILLKIE FARR & GALLAGHER LLP
Richard Mancino
Marc Abrams
Christopher J. St. Jeanos
Nisha Menon
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Joanne B. Wills, hereby certify that on this 21st day of November, 2003, I caused a copy of the foregoing **Emergency Petition for Writ of Mandamus Of D.K. Acquisition Partners, L.P., Fernwood Associates, L.P. And Deutsche Bank Trust Company Americas** on the attached Service List in the manner there indicated.

KLEHR, HARRISON, HARVEY,
BRANZBURG & ELLERS LLP

By: _____
Joanne B. Wills (#2357)
919 Market Street, Suite 1000
Wilmington, DE 19801-3062
(302) 426-1189